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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 In re
15 EAGAN AVENATTI, LLP,
16 Debtor.

Case No. 8:18-cv-01644-VAP-KES

The Hon. Karen E. Scott

**JUDGMENT CREDITOR JASON
FRANK LAW, PLC'S NOTICE OF
MOTION AND MOTION TO
COMPEL BIENERT KATZMAN PC
TO COMPLY WITH SUBPOENA;
DECLARATION OF JASON M.
FRANK IN SUPPORT THEREOF**

*([Proposed] Order filed concurrently
herewith)*

Date: May 28, 2019
Time: 10:00 a.m.
Courtroom: 6D

**TO THE COURT AND TO THE PARTIES AND THEIR ATTORNEYS
OF RECORD AND THIRD-PARTY BIENERT KATZMAN PC AND ITS
ATTORNEYS:**

PLEASE TAKE NOTICE that on May 28, 2019 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 6D of the Santa Ana division of the above-entitled Court, located at 411 West Fourth Street, Santa Ana, California 92701,

Judgment Creditor Jason Frank Law, PLC (“JFL”) will, and hereby does, move this Court for an order compelling third-party Bienert Katzman PC (“Bienert”) to comply with the subpoena attached to the Declaration of Jason M. Frank (“Frank Decl.”) as Exhibit A (the “Subpoena”). Bienert appeared as counsel for Michael Avenatti (“Avenatti”) at his pre-indictment arraignment in the Central District of California.

This application is made pursuant to Central District Local Rule 7-3 and Federal Rules of Civil Procedure Rules 34, 45 and 69(a) on the grounds that:

On April 2, 2019, JFL properly served a subpoena on Bienert requiring Bienert to produce “[a]ll checks, wire transfers or other documents reflecting any payments or retainers [Bienert] has received related to its representation of Michael J. Avenatti.” (Frank Decl., Ex. A.)

On April 15, 2019, Bienert served objections to the subpoena on the grounds that (a) the documents are protected by the attorney-client privilege; (b) engagement agreements are privileged from discovery under California law; and (c) the Fifth Amendment of the U.S. Constitution precludes their production. (Frank Decl., Ex. B.) Based on the foregoing, Bienert refused to produce any documents. (Id.)

Bienert’s objections are without merit:

The Ninth Circuit has consistently held that “the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee and who paid it do not come within the privilege of attorney-client relationship.” In re Michaelson,

1 511 F.2d 882, 888 (9th Cir. 1975).

2 Further, “[t]he client’s Fifth Amendment privilege is not violated by
3 enforcement of a subpoena directed towards his attorney.” *Beckler v. Sup. Ct.*, 568
4 F.2d 661, 662 (9th Cir. 1978).

5 For these reasons, the Ninth Circuit held that compelling an attorney to
6 disclose his fee arrangement with his client and who is paying the fees does not
7 violate a client’s Fifth Amendment privilege against self-incrimination. *Michaelson*,
8 511 F.2d at 889.

9 In addition, this Court has already held federal privilege law and not California
10 law applies to this case, and fee agreements are properly the subject of discovery in
11 these post-judgment collection proceedings. (Frank Decl., Ex. C at 19:15 – 20:13.)

12 The purpose of the Subpoena is to determine whether Avenatti is paying
13 Bienert with funds that properly belong to Judgment Debtor Eagan Avenatti LLP
14 (“EA”) and which should be made available to satisfy JFL’s judgment. JFL has
15 already uncovered evidence of Avenatti using EA’s funds to pay for his divorce
16 attorney, among other personal expenses. (Frank Decl., Exs. E-G.) Thus, there is a
17 good faith basis to believe that Avenatti is similarly using EA property to pay for
18 Bienert’s services.

19 Pursuant to Local Rule 7-3, on April 24, 2019 counsel for JFL met and
20 conferred with Michael Williams and Ali Matin, counsel for Bienert. Counsel for
21 Bienert indicated that they were serving the objection at the direction of Avenatti and
22 are requiring JFL to file a motion to compel so Avenatti will have the opportunity to
23 oppose the subpoena.

24 Dated: April 29, 2019

FRANK SIMS & STOLPER LLP

25
26 /s/ Scott H. Sims
27 Scott H. Sims
28 Andrew D. Stolper
Attorneys for Judgment Creditor,
JASON FRANK LAW, PLC

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1 **I. INTRODUCTION**

2 On April 2, 2019, Judgment Creditor Jason Frank Law, PLC (“JFL”) properly
 3 served a subpoena (the “Subpoena”) on Bienert Katzman PC (“Bienert”) requiring
 4 Bienert to produce “[a]ll checks, wire transfers or other documents reflecting any
 5 payments or retainers [Bienert] has received related to its representation of Michael
 6 J. Avenatti.” (Declaration of Jason M. Frank (“Frank Decl.”), Ex. A.) Bienert is
 7 representing Michael Avenatti (“Avenatti”) in connection with the recent criminal
 8 indictment filed in the United States District Court, Central District of California,
 9 Southern Division, Case No. SACR19-00061-JVS.¹

10 On April 15, 2019, Bienert served objections to the Subpoena on the grounds
 11 that (a) the documents are purportedly protected by the attorney-client privilege; (b)
 12 the firm’s engagement agreements with Avenatti are privileged from discovery under
 13 California law; and (c) the Fifth Amendment of the U.S. Constitution precludes their
 14 production. (Frank Decl., Ex. B.) Bienert further objected to the extent the Subpoena
 15 requested invoices and descriptions of the work performed by Bienert on
 16 Avenatti’s behalf. (Id.) Based on the foregoing, Bienert refused to produce any
 17 documents. (Id.)

18 On April 16, 2019, counsel for JFL sent a meet and confer correspondence
 19 confirming that JFL is only seeking (a) Bienert’s retainer agreement with Avenatti;
 20 (b) any other agreements Bienert has with Avenatti or any third party to pay for
 21 Bienert’s representation of Avenatti; and (c) the payment documents (i.e., wires,
 22 checks or similar documents) reflecting payments or retainers made on Avenatti’s
 23 behalf so that JFL may determine the source of the funds. (Frank Decl., Ex. D.) JFL
 24 is not seeking time sheets or invoice entries detailing Bienert’s work for Avenatti, or
 25 attorney-client communications. (Id.)

26
 27
 28 ¹ Bienert represented Avenatti at the pre-indictment arraignment held on April 1,
 2019. (Frank Decl., ¶ 2.)

1 Bienert's objections to the Subpoena are without merit:

- 2 • The Ninth Circuit has consistently held that "the fact of a retainer, the
3 identity of the client, the conditions of employment and the amount of
4 the fee and who paid it do not come within the privilege of attorney-
5 client relationship." In re Michaelson, 511 F.2d 882, 888 (9th Cir.
6 1975).
- 7 • Further, "[t]he client's Fifth Amendment privilege is not violated by
8 enforcement of a subpoena directed towards his attorney." Beckler v.
9 Sup. Ct., 568 F.2d 661, 662 (9th Cir. 1978) (citing Fisher v. U.S., 425
10 U.S. 391, 96 S.Ct. 1569, 1574 (1976).
- 11 • For these reasons, the Ninth Circuit held that compelling an attorney to
12 disclose his fee arrangement with his client and who is paying the fees
13 does not violate a client's Fifth Amendment privilege against self-
14 incrimination. Michaelson, 511 F.2d at 889.
- 15 • In addition, this Court has already overruled Avenatti's objections to
16 production of fee agreements based on Avenatti's contention that such
17 agreements are privileged under California privacy law. (Frank Decl.,
18 Ex. C at 19:15 – 20:13.)

19 In sum, Bienert does not have any valid grounds to refuse to respond to the Subpoena.

20 The purpose of the Subpoena is to determine whether Avenatti is paying
21 Bienert with funds that properly belong to Judgment Debtor Eagan Avenatti LLP
22 ("EA") and which should be made available to satisfy JFL's judgment. JFL has
23 already uncovered evidence of Avenatti using EA's funds to pay for his divorce
24 attorney, among other personal expenses. (Doc. 70, pp. 12-15; Frank Decl., Exs. E -
25 G.) Thus, there is a good faith basis to believe that Avenatti is similarly using EA
26 property to pay for Bienert's services.

1 For the foregoing reasons, JFL requests the Court grant this application and
 2 compel Bienert to immediately produce the records responsive to the Subpoena.

3 **II. THIS APPLICATION SHOULD BE GRANTED**

4 **A. The Relevant Legal Standards.**

5 Federal Rule of Civil Procedure 69(a)(2) governs discovery in judgment
 6 enforcement proceedings and provides that a judgment creditor “may obtain
 7 discovery from *any person* - including the judgment debtor - as provided in these
 8 rules or by the procedure of the state where the court is located.” Internet Direct
 9 Response, Inc. v. Buckley, 2010 WL 1752181, at *2 (C.D. Cal. Apr. 29, 2010). “The
 10 presumption should be in favor of full discovery of any matters arguably related to
 11 the [creditor’s] efforts to trace [the debtor’s] assets and otherwise to enforce the
 12 judgment.” Id. (quoting Credit Lyonnais, S.A. v. SGC Int’l, Inc., 160 F.3d 428, 430–
 13 31 (8th Cir.1998).) Accordingly, pursuant to FRCP 36 and 45, a judgment creditor
 14 may serve subpoenas on third-parties requesting documents related to its efforts to
 15 enforce the judgment. Id. Further, in actions to enforce a judgment in federal court
 16 under FRCP 69, federal common law regarding privilege applies, not state law. Id.
 17 at *5 (citing Heathman v. United States District Court, 503 F.2d 1032 (9th Cir. 1974).)

18 **B. Bienert’s Objections Are Without Merit.**

19 As noted above, the Subpoena simply calls for the production of “[a]ll checks,
 20 wire transfers or other documents reflecting any payments or retainers [Bienert] has
 21 received related to its representation of Michael J. Avenatti.” (Frank Decl., Ex. A.)
 22 Bienert has objected on the grounds that (a) the documents are purportedly protected
 23 by the attorney-client privilege; (b) the firm’s engagement agreements with Avenatti
 24 are privileged from discovery under California law; and (c) the Fifth Amendment of
 25 the U.S. Constitution precludes their production. (Frank Decl., Ex. B.) These
 26 objections are without merit.

1 *First*, the Ninth Circuit has consistently held that “the fact of a retainer, the
 2 identity of the client, the conditions of employment and the amount of the fee and
 3 who paid it do not come within the privilege of attorney-client relationship.” In re
 4 Michaelson, 511 F.2d 882, 888 (9th Cir. 1975). JFL confirmed during the meet and
 5 confer process that the Subpoena was limited to this information and JFL was not
 6 seeking descriptions of the work performed by Bienert or attorney-client
 7 communications. (Frank Decl., Ex. Ds.) JFL simply wants to know the bank
 8 accounts and sources of funds that have been or will be paid to Bienert to represent
 9 Avenatti so JFL can determine whether Avenatti is improperly using EA’s assets to
 10 pay for Bienert’s services. There is good cause for such discovery because Avenatti
 11 has already been caught using EA’s assets to pay for his personal divorce attorney –
 12 as detailed in JFL’s Opposition to Avenatti’s Motion to Quash Bank of America
 13 Subpoena. (Doc. 70 at 12-15; Frank Decl., Exs. E-G.) As such, Bienert’s objections
 14 based on the attorney-client privilege are without merit.

15 *Second*, the Ninth Circuit has previously rejected the same assertion of a Fifth
 16 Amendment Privilege as the one asserted by Bienert. Michaelson, 511 F.2d at 889-
 17 91. In Michaelson, an attorney asserted the Fifth Amendment privilege when
 18 refusing to answer questions regarding, *inter alia* (a) the terms of his fee agreement
 19 with his client, (b) how much money he received from the client, (c) whether the
 20 attorney received money from any other persons to represent the client, and (d)
 21 whether the attorney had any fee arrangements with third parties concerning the
 22 client’s representation. Id. at 886. The district court issued contempt sanctions
 23 against the attorney for his refusal to answer these questions and the Ninth Circuit
 24 affirmed.

25 The Ninth Circuit explained that “the fact of a retainer, the identity of the
 26 client, the conditions of employment and the amount of the fee and who paid it do
 27 not come within the privilege of attorney-client relationship.” Michaelson, 511 F.2d
 28

1 at 888. The Ninth Circuit further explained that “the Fifth Amendment privilege is a
 2 personal privilege: it adheres basically to the person, not to information that may
 3 incriminate him.” Michaelson, 511 F.2d at 889. Or, as Justice Holmes stated, “[a]
 4 party is privileged from producing the evidence but not from its production.”
 5 Johnson v. United States, 228 U.S. 457, 457 (1913). Consequently, the Ninth Circuit
 6 held as follows:

7 The fee information requested in this instance is not a privileged
 8 professional communication between lawyer and client in which the
 9 client has a legitimate expectation of privacy. Furthermore, the
 10 compulsion of this contempt order is directed not at compelling [the
 11 client] to testify, but rather against [the attorney.] . . . **We hold today**
 12 **that no Fourth or Fifth Amendment claim can prevail where, as in**
 13 **this case, there exists no legitimate expectation of privacy and no**
semblance of government compulsion against the person of the
accused.

14 Michaelson, 511 F.2d at 889 (emphasis added) (citations omitted).² This is in accord
 15 with other Ninth Circuit authority holding that a “client’s Fifth Amendment privilege
 16 is not violated by enforcement of a subpoena directed toward his attorney.” Beckler
 17 v. Sup. Ct., 568 F.2d 661, 662 (9th Cir. 1978) (citing Fisher v. U.S., 425 U.S. 391,
 18 96 S.Ct. 1569, 1574 (1976).) This is because compelling an attorney to produce
 19 documents is not the same as compelling a client to testify against himself, especially
 20 where, as here, there is no legitimate expectation of privacy regarding a client’s
 21 payments to his attorney. Id.; Michaelson, 511 F.2d at 899.

22 *Third*, this Court has already rejected the argument that retainer agreements
 23 are absolutely privileged from production in this case. (Frank Decl., Ex. C at 19:15
 24

25 ² The Ninth Circuit also noted the client had been granted qualified immunity and this
 26 provided an alternative ground to uphold the contempt order. Michaelson, 511 F.2d
 27 at 890-92. However, this was a *separate* ground for the decision and did not affect
 28 the Ninth Circuit’s earlier conclusion that the Fifth Amendment simply did not apply
 in these circumstances.

– 20:13). The Court correctly found that federal law, not California law, applies to this case because it involves a federal judgment. Id.; Internet Direct Response, 2010 WL 1752181 at *5. As the Court held when overruling Avenatti’s objection to produce client retainer agreements:

Under Federal privilege law, there’s not an absolute privilege for fee agreements or retainer agreements or tax returns but rather there’s a balancing that the Court engages in in order to serve some of the public interests that are served by affording those kinds of documents some protection and yet still serving the public interests that are at stake here in this judgment collection proceeding. When the Court considers the nature of the relationship of the parties, the nature of this particular dispute, and the fact that documents can be produced here on a confidential basis, it seems that that’s a sufficient tipping of the scales in favor of production, again with the understanding that those documents can be labeled as confidential in the discovery process.

(Frank Decl., Ex. C at 19:25 – 20:13.) In sum, Bienert’s objections should be overruled and Bienert should be compelled to produce the records responsive to the Subpoena.

III. CONCLUSION

For the foregoing reasons, JFL requests the Court grant this Motion.

Dated: April 29, 2019

FRANK SIMS & STOLPER LLP

/s/ Scott H. Sims
 Scott H. Sims
 Andrew D. Stolper
 Attorneys for Judgment Creditor,
 JASON FRANK LAW, PLC

DECLARATION OF JASON M. FRANK

I, JASON M. FRANK, declare as follows:

1. I am a partner at Frank Sims & Stolper, LLP (“FSS”) counsel of record for judgment creditor Jason Frank Law, PLC (“JFL”). I am also the owner of JFL. I am admitted to practice law before all federal and state courts in the State of California, and I am a member in good standing of the State Bar of California. I have personal knowledge of the facts set forth herein, unless stated on information and belief, and if called as a witness, I could and would competently testify thereto.

2. Attached as **Exhibit A** is a true and correct copy of the subpoena my office served on Bienert Katzman PC (“Bienert”) on or about April 2, 2019 (the “Subpoena”). Bienert appeared as Avenatti’s counsel at Avenatti’s pre-indictment arraignment on April 1, 2019.

3. Attached as **Exhibit B** are Bienert’s objections to the Subpoena.

4. Attached as **Exhibit C** is the transcript from the Court’s November 28, 2018 hearing on Avenatti’s Motion for a Protective Order.

5. Attached as **Exhibit D** is an email correspondence sent by my attorney Scott H. Sims to counsel for Bienert on April 16, 2019 in response to Bienert’s objections. The email, among other things, clarified that JFL is only seeking (a) Bienert’s retainer agreement with Avenatti; (b) any other agreements Bienert has with Avenatti or any third party to pay for Bienert’s representation of Avenatti; and (c) the payment documents (i.e., wires, checks or similar documents) reflecting payments or retainers made on Avenatti’s behalf so that JFL may determine the source of the funds. (Frank Decl., Ex. D.) JFL is not seeking time sheets or invoice entries detailing Bienert’s work for Avenatti, or attorney-client communications. (Id.)

1 6. Attached as **Exhibit E** are five checks from Medline Industries, Inc.
2 (“Medline”) which were deposited into the Avenatti LLP account for a total of
3 \$231,982.00. These checks were produced by City National Bank (“CNB”) in
4 response to a subpoena on or about April 1, 2019. JFL was required to subpoena
5 these documents directly from the bank because Avenatti refused to comply with this
6 Court’s November 28, 2018 order to produce his and his entities’ bank records,
7 among other documents. The Court will note that these Medline checks are dated on
8 or after November 28, 2018.

9 7. Attached as **Exhibit E** are outgoing checks and wires from the Avenatti
10 LLP account produced by CNB reflecting personal payments that Avenatti made
11 from the Medline money including his rent at the Ten Thousand building
12 (\$69,118.50) and his divorce attorney Stegmeier Gelbert (\$10,000), among other
13 personal expenses.

14 8. After receiving the CNB bank records, I immediately notified the
15 Receiver, Brian Weiss of the location of the Medline checks. Weiss later informed
16 me that Medline had sent his counsel various emails between EA office manager,
17 Judy Regnier, and Medline evidencing Avenatti and Regnier instructing Medline to
18 change the names on the checks from Eagan Avenatti LLP to Avenatti LLP and to
19 send the checks to Regnier’s personal address in Yorba Linda, California. Attached
20 as **Exhibit F** are copies of email threads evidencing Avenatti and Regnier’s
21 instructions to Medline to change the name of the payee and address of the checks,
22 including images of Avenatti and Regnier destroying an EA check so it can be made
23 out to Avenatti LLP.

24 9. Pursuant to Local Rule 7-3 and the direction of this Court, on April 24,
25 2019, my partner, Scott Sims and I met and conferred telephonically with Michael
26 Williams and Ali Matin, counsel for Bienert. Counsel for Bienert indicated they are
27 asserting the objections at the request of Avenatti and requiring JFL to file a Motion
28 to Compel so that Avenatti has the opportunity to oppose the production.

1 I declare under penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct. Executed this 29th day of April
3 2019.

4
5 /s/ Jason M. Frank

JASON M. FRANK